

INTERSTATE COMMERCE COMMISSION 03/20/96

FINANCE DOCKET # 32760 2314-2373 4+

1 that's off the --

2 JUDGE NELSON: Fine.

3 MR. LIVINGSTON: Now, we skipped over --

4 JUDGE NELSON: KCS.

5 MR. LIVINGSTON: -- KCS materials that
6 began at the bottom of page 1. There are four KCS
7 bullets. And just to review the bidding of where we
8 are generally --

9 JUDGE NELSON: Mr. Lubel said there are
10 five interrogatories that he didn't want to answer,
11 and we've just gotten rid of one.

12 MR. LIVINGSTON: Right.

13 JUDGE NELSON: We can dispute about four.

14 MR. LIVINGSTON: Right.

15 MR. LUBEL: When I say don't want to
16 answer, we don't want to provide any information or
17 documents, don't think we should have to. All of the
18 others we agreed to provide it as soon as we can.

19 JUDGE NELSON: You've lost part of that
20 game as to the last one. All right.

21 MR. LIVINGSTON: Just to sort of review
22 the bidding, the only disputes that we haven't

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1 addressed yet are these KCS disputes, and that would
2 be the last one of our -- the things we've raised.
3 There is also a matter that was raised by the Western
4 Shippers Coalition concerning coal bids, and that's
5 the only other thing left on the table. That's coming
6 from them against us. So we're --

7 JUDGE NELSON: How do you want to proceed,
8 then?

9 MR. LIVINGSTON: I guess it makes no
10 difference to me. We can do the case against us
11 first, or we can do the WSC first.

12 JUDGE NELSON: Have you all had a lunch
13 break? I did. I know I saw Mr. McBride in there,
14 but --

15 MR. LIVINGSTON: We did. I think we all
16 did a little bit of snacking. Mine was limited to a
17 cup of coffee. But I think -- at least it would be my
18 preference to finish.

19 JUDGE NELSON: Well, we also have -- I
20 want to await your chance to talk with Mr. Lubel about
21 the --

22 MR. LIVINGSTON: That's --

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1 JUDGE NELSON: -- Tex Mex acquisition
2 interrogatories. So that's one. We may have other
3 things like that we have to talk about.

4 MR. LIVINGSTON: Well, perhaps we ought to
5 finish up --

6 JUDGE NELSON: Let's continue through with
7 KCS, though.

8 MR. LIVINGSTON: Right. And then we can
9 finish up with Mr. McBride and then take our --

10 JUDGE NELSON: And then take a break and
11 then come to Mr. McBride, right.

12 MR. McBRIDE: How long a break?

13 JUDGE NELSON: Just however long the pants
14 are to reach the ground. We need to get an agreement
15 between Mr. Lubel and Mr. Livingston on the scope of
16 some interrogatories. I want them to be talking.

17 MR. McBRIDE: I understand. I --

18 MR. LIVINGSTON: Your Honor, the --

19 JUDGE NELSON: Maybe we can divide up the
20 talent over there and use Ms. -- what is your
21 colleague's name here?

22 MR. LIVINGSTON: Ms. Kramer.

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1 JUDGE NELSON: Is she available to pitch
2 in with Mr. McBride?

3 MR. LIVINGSTON: Well, I think Mr.
4 McBride's argument is there is no room, really, for
5 discussion. It's just a matter of --

6 JUDGE NELSON: Or is Mr. Norton available
7 to help out on this?

8 MR. NORTON: Well, I was going to suggest,
9 Your Honor, that we proceed with KCS, and then go on
10 to Mr. McBride, and then take a break.

11 MR. LIVINGSTON: That way Mr. McBride can
12 go home and --

13 JUDGE NELSON: That's true. He doesn't
14 have to sit there the rest of the afternoon.

15 MR. McBRIDE: I was looking for just a
16 little consideration.

17 (Laughter.)

18 JUDGE NELSON: That's fine.

19 MR. McBRIDE: I just got it. Thank you.

20 JUDGE NELSON: I think that's a good
21 point. Okay.

22 (Laughter.)

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1 Go ahead, Mr. Livingston.

2 MR. LIVINGSTON: All right. Mr. Lubel,
3 the first two bullets on KCS are quite similar. They
4 involve interrogatories and document requests that are
5 of a Phase 1 kind. And it was our interesting that we
6 would get responses on March 12th. If Your Honor is
7 still open -- has the book open to the KCS discovery
8 request --

9 JUDGE NELSON: Yes, sir.

10 MR. LIVINGSTON: -- if you would turn to
11 page -- let's see -- 5 of that document. The first
12 one of these -- and I think we can do this by example,
13 not go through all of them.

14 JUDGE NELSON: I'm on page 5.

15 MR. LIVINGSTON: Interrogatory number 5 --

16 JUDGE NELSON: Yes, sir.

17 MR. LIVINGSTON: -- the interrogatory
18 recites a fairly lengthy quotation from a KCS
19 pleading.

20 JUDGE NELSON: Yes.

21 MR. LIVINGSTON: And then it asks, were
22 these calculations based on weighbill sample data? If

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1 not, what data were used? And so forth. Fairly
2 specific questions. The response is essentially that
3 responsive information will be contained either in the
4 March 29 filing and/or in documents to be placed in
5 the depository after March 29. And that's a fairly --
6 that's a response that's given in -- to a number of
7 these interrogatories that are the subject of bullet
8 number 1 and bullet number 2.

9 MR. LUBEL: The 26.

10 MR. LIVINGSTON: Right, the 26. So that's
11 a sample of the 26 of them.

12 Our position on this is that these are all
13 Phase 1 materials. And instead of getting the
14 information on March -- when did we -- 12th, 15 days
15 after the things were served, as Phase 1 responses,
16 we're now told that we're going to get the answers on
17 March 29 or later, when documents are placed in the
18 depository.

19 In effect, we are being given Phase 2
20 timing on Phase 1 discovery. Now, Mr. Lubel will tell
21 you that he is -- and all of the company and his other
22 lawyers are all terribly busy with their March 29

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1 filings, and I'm sure they are busy with their
2 March 29 filings. And he will say to you that they
3 don't have time to give answers to --

4 JUDGE NELSON: Do you have to file
5 anything on March 29?

6 MR. LIVINGSTON: I don't know if we do or
7 not.

8 JUDGE NELSON: When is your filing?

9 MR. LIVINGSTON: I know we have some
10 filing. I know we have an environmental -- I believe
11 we have an environmental filing. Whether we have
12 anything else, I don't know.

13 JUDGE NELSON: When is your filing due?

14 MR. LIVINGSTON: End of April.

15 JUDGE NELSON: After the 29th, when you
16 have to respond to the --

17 MR. LIVINGSTON: End of April.

18 JUDGE NELSON: End of April.

19 MR. LIVINGSTON: I think it's 30 days
20 later is my --

21 MR. McBRIDE: April 29th.

22 MR. LIVINGSTON: April 29th.

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1 JUDGE NELSON: So this fight is simply
2 about when you get this stuff.

3 MR. LIVINGSTON: Right. But it's a fight
4 that I thought we had waged the last hearing, and that
5 the Phase 1 material would be given to us in Phase 1.
6 And what -- instead, we get these responses that we
7 don't get any of the Phase 1 material now. We don't
8 get responses to any of these interrogatories. We get
9 an answer that says, "Well, you'll find something on
10 March 29" --

11 JUDGE NELSON: It says Phase 2.

12 MR. LIVINGSTON: Yes. And so we've gotten
13 zilch. That's the --

14 JUDGE NELSON: Well, let's set that up.

15 MR. LIVINGSTON: That is our objection.
16 We would like to --

17 JUDGE NELSON: The claim is that these
18 were supposed to be Phase 1 materials, and you've
19 given an answer that says you'll get them in Phase 2.

20 MR. NORTON: Your Honor, which is in
21 contrast to how most of the other parties have
22 responded. They have, in varying ways, produced

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1 materials, as Mr. McBride and others have.

2 MR. LUBEL: Your Honor, let me make
3 another point -- a number of points, if I may. First,
4 I've committed to these gentlemen to get them as much
5 of the information in response to the interrogatories
6 and requests of these 26 as I can, before the 29th,
7 within the physical and human limits that we have of
8 time and manpower.

9 We are faced with --

10 JUDGE NELSON: Before the 29th?

11 MR. LUBEL: Yes, yes. I mean, some of
12 these questions, to the -- I've told them, to the
13 extent that something is a yes or no, and I can get a
14 quick answer to it, I will endeavor in good faith to
15 do that. The problem we have, Your Honor, as
16 Mr. Livingston anticipated because he has heard me
17 explain this to him, is that we have basically one
18 more week, Your Honor. And we have all been working
19 -- myself -- it's not just the lawyers, it's the
20 consultants, this Mr. Grimm is a consultant. I was --

21 JUDGE NELSON: I hear all of that. What
22 about his claim that this was already held to be

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1 Phase 1 material and you're not giving it to him?

2 MR. LUBEL: Well, we are working on
3 getting it up, Your Honor, and I will endeavor to get
4 the information up. The problem is is I've got people
5 working until 10:00 and 12:00 at night right now,
6 crying to make our submission to the Board.

7 What is going on here -- let's just bring
8 it out on the table, Your Honor. What is going on
9 here is they are trying to interfere, and will if
10 we're ordered to make this available, interfere with
11 our preparation of our case. Your Honor, there is
12 just not enough time to do it.

13 If I might, Your Honor, I've got a whole
14 list here. I won't go through all of the details.

15 JUDGE NELSON: Well, remember, the time
16 was set by the Commission, the overall time.

17 MR. LUBEL: Right.

18 JUDGE NELSON: I could have required all
19 of this stuff to be produced a week ago, or whatever
20 it was. That was the applicant's theory, and they're
21 very unhappy that I broke it into two phases. So if
22 one believes their view of the world, I've already

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1 given you a tremendous break. You ought to embrace
2 it, be thankful with it, and run home quickly with the
3 Phase 1 material.

4 MR. LUBEL: And, Your Honor, I --

5 JUDGE NELSON: And now this -- you can't
6 comply with Phase 1.

7 MR. LUBEL: I've endeavored to get up that
8 information. I've talked to all of the people, and
9 all of these interrogatories are out to the people
10 that have the information, and we're waiting to get
11 responses from them.

12 JUDGE NELSON: Let's see if there is any
13 way of looking at these interrogatories and see
14 whether some of them can be answered more quickly than
15 others, in terms of what they are, what they seek,
16 what their urgency is. What are the other three?

17 MR. LUBEL: Your Honor, this might help in
18 that regard, in terms of urgency. I would point out
19 that this statement they made in KCS 13 was filed on
20 September 18, 1995. They've had since that time when
21 they could have asked us for this information. They
22 wait until the last month when they know, and

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1 Mr. Roach said at one of our last hearings they were
2 all going to be involved in our presentations.
3 They've waited until this last minute to come in and
4 ask for that.

5 JUDGE NELSON: The rules let them do that.

6 MR. LUBEL: Correct, Your Honor. And I'm
7 trying to get it, Your Honor, and I'm going to
8 endeavor to get it for them as quickly as I can.

9 JUDGE NELSON: Those were our rules,
10 weren't they? Our guidelines. If they enable the
11 applicants to do this, and it's within the four
12 corners of the rule, so be it.

13 Show me the other ones. We have number 5.

14 What are --

15 MR. LIVINGSTON: Well, Your Honor, there's
16 26 of them.

17 JUDGE NELSON: I thought there were only
18 four in dispute.

19 MR. LUBEL: No, there is only --

20 JUDGE NELSON: There's 26 in this category
21 of timeliness.

22 MR. LUBEL: Twenty-six in this category

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1 where I've said I will do the best I can to get this
2 information before the 29th. It will be -- this
3 particular one, Your Honor, this particular one asks
4 me about how we've made these --

5 JUDGE NELSON: Does either counsel have a
6 suggestion on the applicant's side as to ones -- I
7 understand your position that you'd like them all
8 immediately -- as to ones that you need most quickly?
9 And on the KCS side, as to ones that you are in a
10 position to get the most quickly?

11 MR. LUBEL: Yes, Your Honor. I can.

12 JUDGE NELSON: Can you give me some help
13 like that?

14 MR. LUBEL: Let's start with this one.
15 Are you ready? Okay. And I have to verify this. I
16 have to verify this. But on this one, were these
17 calculations based on weighbill sample data? My
18 understanding, subject to being verified, yes.

19 How were the number of independent
20 alternatives in a BEA pair determined? That's
21 something that's a little more complicated that I'd
22 have to inquire about. Was all traffic in a BEA pair,

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1 regardless of how many railroads served, particular
2 movements included in the revenue calculations,
3 regardless of whether it was deemed two to one or
4 three to two. My answer -- my understanding of that
5 is yes.

6 Have similar calculations been done based
7 on the data or reflect the BN settlement agreement?
8 That's going to be in our March 29th filing. And the
9 problem is, Your Honor, they then asked me -- this is
10 what -- this is just an interrogatory. That was easy.
11 Yes or no is easy. They then say, "Produce all
12 documents that relate to this statement." That means
13 that while my consultant is trying to put together his
14 statement to make the best presentation he --

15 JUDGE NELSON: Well, suppose I wanted to
16 agree with you and place this so that something gets
17 there quickly and the rest of it gets there on
18 March 29. How am I going to do that?

19 MR. LUBEL: Well, I mean, answer the
20 interrogatory --

21 JUDGE NELSON: Every question for 26
22 interrogatories.

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1 MR. LIVINGSTON: I think he has just
2 pointed the way to the solution.

3 MR. LUBEL: Answer the interrogatories,
4 but the documents get put in the depository, to the
5 extent I can.

6 MR. LIVINGSTON: We got more information
7 in the last five minutes on the response to
8 interrogatory number 5 than we got from this written
9 response, which said wait until March 29th.

10 JUDGE NELSON: All right. Suppose we have
11 him answer the interrogatories by -- how soon can we
12 do that?

13 MR. LUBEL: Well, Your Honor, the yes/no
14 interrogatories are simple. Some of the
15 interrogatories, though, they're not all the same.
16 Some of them say, "Provide a detailed explanation" of
17 how you did something.

18 JUDGE NELSON: Well, the ones that require
19 documents or detailed explanations, where you'd have
20 to create something, why don't we say that that's for
21 Phase 2.

22 MR. LIVINGSTON: But, Your Honor --

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1 JUDGE NELSON: The ones that can otherwise
2 be answered should be answered immediately.

3 MR. LIVINGSTON: If the documents are
4 already in existence, they ought to give them to us
5 now.

6 JUDGE NELSON: No, I said create
7 something. Create --

8 MR. LUBEL: But, Your Honor --

9 JUDGE NELSON: -- suggest something it
10 doesn't already --

11 MR. LUBEL: -- here's the problem. My
12 people are working until midnight now. What do I do?
13 Do I go back, and are they saying -- I just want this
14 to be clear. Are they saying that my people should
15 forebear from their presentation of the case to the
16 Commission?

17 JUDGE NELSON: I'm sure they'd be very
18 happy if that --

19 MR. LUBEL: Well, I think that's what this
20 is all about, Your Honor. That's what this is all
21 about.

22 JUDGE NELSON: I understand this

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1 contention.

2 MR. LIVINGSTON: Other parties responded
3 on March 12th and gave actual information.

4 JUDGE NELSON: I'm trying to steer a way
5 through here --

6 MR. LUBEL: And I suggested that, Your
7 Honor.

8 JUDGE NELSON: -- that requires some
9 production but doesn't cripple you, so you can get the
10 stuff in on March 29th. And one way to do it is by --
11 with respect to all document production, that be put
12 off. That's Phase 2.

13 With respect to answering interrogatories,
14 those that can be answered yes or no, or I don't know,
15 or in simple fashion, shall be answered immediately.
16 And those that require the creation of document
17 studies or analyses shall be for Phase 2. How does
18 that work?

19 MR. LIVINGSTON: It makes it worse than it
20 was when I raised the objection. By putting things in
21 Phase 2, he --

22 JUDGE NELSON: Well, you're going to get

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1 some answers.

2 MR. LIVINGSTON: What?

3 JUDGE NELSON: You're going to get some
4 answers.

5 MR. LIVINGSTON: Well, he was offering to
6 do things as fast as he could, and this Phase 2
7 requires reformatting and resubmitting and we'll get
8 things in mid April.

9 MR. NORTON: Maybe that's something to
10 clarify, Your Honor. Were you just suggesting that --
11 when you said Phase 2 in this context, you were saying
12 March 29?

13 JUDGE NELSON: Yes.

14 MR. NORTON: Okay. That they produce, not
15 that we get further objections.

16 JUDGE NELSON: Not that we go through it
17 again, no, that they be produced on the 29th.

18 MR. LUBEL: Your Honor, I can't produce
19 everything --

20 JUDGE NELSON: They're going to produce
21 the stuff. It's only a question of when.

22 MR. LUBEL: I can't produce everything on

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1 the 29th. We have to submit our filing on the 29th.

2 JUDGE NELSON: Then the next business day,
3 or something of that nature. That's a detail we can
4 work out. I'm trying to get a measuring -- a dividing
5 line here for what you have to answer immediately.

6 MR. LUBEL: And I would say what you've
7 suggested is --

8 JUDGE NELSON: What I said was the
9 interrogatories --

10 MR. LUBEL: That are susceptible --

11 JUDGE NELSON: -- that are susceptible to
12 yes, no, or I don't know --

13 MR. LUBEL: Right.

14 JUDGE NELSON: Those that require searches
15 for documents can come in on a date we'll come up
16 with. Those that require production of documents
17 already found and in existence should be complied with
18 immediately.

19 MR. LUBEL: Already. To the extent --

20 JUDGE NELSON: In existence, yes.

21 MR. LUBEL: Well, but in existence, Your
22 Honor, we've got at our consultant's, at our offices

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1 in Kansas City, we have lots of documents that are
2 sitting there. But then somebody has got to stop
3 doing what they're doing, go get those, gather them,
4 come, review them for privilege and for proprietary
5 nature, Bates Stamp them, go through all of that --
6 you know, and I'm willing to embark on that, to the
7 best I can.

8 JUDGE NELSON: Where is the documentary
9 part of interrogatory number 5?

10 MR. LUBEL: If you go over to number 42.

11 JUDGE NELSON: Page 42?

12 MR. LUBEL: It's request 42.

13 JUDGE NELSON: What page is that?

14 MR. LUBEL: That's on -- well, it's --
15 well, I've got a different version.

16 MR. LIVINGSTON: It's 26.

17 JUDGE NELSON: 26, I have it.

18 MR. LUBEL: See, it says, "Produce all
19 documents relating to those calculations, and all
20 documents relating to any similar calculations, that
21 have been done based on the '94 data that reflect the
22 Burlington Northern settlement agreement." That is

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1 going -- I assure everyone that matters like that --

2 JUDGE NELSON: That's search time, review
3 time --

4 MR. LUBEL: Right.

5 JUDGE NELSON: -- and xeroxing time, and
6 production.

7 MR. LUBEL: And, furthermore --

8 JUDGE NELSON: You're going to have to do
9 it. You'll put Curtis M. Grimm out there. You can't
10 not make the discovery, so you're going to make that
11 discovery.

12 MR. LUBEL: And that's going to be --
13 these explanations of the things that Mr. Grimm said,
14 yeah, are going to be in our submittal on March 29th.
15 I'm going to beat the -- it's not going to be after
16 the 29th. The things that Mr. Grimm has said in these
17 early filings are going to be expanded upon and
18 explained in a very profound way.

19 JUDGE NELSON: What I'm going to do --
20 taking interrogatory 5 as typical of this group of
21 interrogatories, I'm going to direct the KCS to answer
22 the interrogatories, to the extent they can be

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1 answered, by close of business tomorrow.

2 To the extent they require production of
3 documents or creation of documents or searches for
4 documents, I am going to direct production no sooner
5 than March 29th, when the substantive filings are
6 made. And I'm willing to entertain a suggestion for
7 a day or two thereafter if you need that.

8 MR. LUBEL: Well, we do need that, Your
9 Honor, because we are going to be working on the 29th
10 to get our submittal in. And then everybody is going
11 to try to take a breath, you know, and see their
12 families, and --

13 JUDGE NELSON: Well, but we're all going
14 to be in here on April -- what was it -- 3rd of 4th,
15 to review this matter of the association claims. And
16 why don't we make that a day for a turnover of
17 whatever it is hasn't yet been turned over.

18 MR. LUBEL: We'll certainly endeavor to,
19 Your Honor.

20 JUDGE NELSON: Let me go off the record
21 for a moment.

22 (Whereupon, the proceedings were off the

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1 record briefly.)

2 JUDGE NELSON: I was asked, first of all,
3 whether we're going to have another discovery
4 conference this week in the UP/SP case. I believe the
5 answer is no, that today's conference will cover what
6 would have been done last Friday and what we would
7 anticipate would be done this week. So there will be
8 no more railroad business with me this week after
9 today.

10 Secondly, we need a day in which we're
11 going to gather on this matter of the associational
12 interrogatories that we discussed earlier -- a day
13 after the March 29 filings. And it will also be a day
14 which will be the final day of reckoning and
15 production for KCS to answer whatever it hasn't
16 answered already of the applicant's document requests.

17 MR. LUBEL: Of the ones that are before us
18 today.

19 JUDGE NELSON: That we're talking about
20 today, yes. I'm not ruling on some new unknowns.

21 And that day is going to be April 3rd,
22 which time I will reserve and will rearrange my

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1 schedule to accommodate that, and that will be at
2 9:30 a.m. on April 3rd. All right.

3 MR. LUBEL: Your Honor, if I -- I'd like
4 to make a point for the record about -- I respect your
5 ruling, but there is a fundamental lack of mutuality
6 and unfairness in what you have just said, in terms of
7 giving us the time period, because you may not be
8 aware of it but throughout the last few months on many
9 occasions you have ordered the applicants, as they
10 should have, to produce documents.

11 And they said, "Fine, we will." And
12 sometimes they volunteered, they said, "We'll go ahead
13 and do it." And then they waited days, weeks, and
14 sometimes months to make it available. And so you
15 have put a burden on us which was never placed on
16 them, even when you ruled that something was relevant
17 and had to be made available.

18 JUDGE NELSON: Are you talking about March
19 -- April 3rd?

20 MR. LUBEL: You put a deadline on us to
21 make stuff available which --

22 JUDGE NELSON: Your contention is that

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1 April 3rd is too soon?

2 MR. LUBEL: -- which is something that I
3 wish we had had put on them.

4 MR. LIVINGSTON: Your Honor, I --

5 MR. LUBEL: You know, my people are going
6 to work on trying to get it by then, but --

7 JUDGE NELSON: Are you suggesting you
8 can't make production by April 3rd?

9 MR. LUBEL: I'm certain I can make much of
10 this production by April 3rd, Your Honor. But my
11 point is that they were never put under such a burden.
12 And what that allowed them to do is -- April 3rd is
13 like two weeks away. They waited weeks and sometimes
14 months before they made available information that you
15 ordered them to produce.

16 Now, I guess it was my fault --

17 JUDGE NELSON: You should have been
18 telling me all of this.

19 MR. LUBEL: I should have been coming back
20 here and complaining more, instead of letting them
21 drag their feet.

22 JUDGE NELSON: That's history. I can't do

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1 anything about it.

2 MR. LUBEL: Okay. I just wanted to note
3 for the record that this is an unequal burden being
4 put on us.

5 JUDGE NELSON: We've got so much time
6 left, Mr. Lubel.

7 MR. LUBEL: Right.

8 JUDGE NELSON: Under the Commission's
9 schedule, and so many things to do within that time,
10 and I'm trying to make it as reasonable as I can.

11 MR. LUBEL: We respect your ruling, Your
12 Honor.

13 JUDGE NELSON: I'm giving you until close
14 of business tomorrow to answer the interrogatories, to
15 the extent that you can answer them readily.

16 MR. LUBEL: Certainly. And I've
17 already --

18 JUDGE NELSON: And to the extent that you
19 can't, or you have to go find documents or create
20 documents; then you have until April 3rd --

21 MR. LIVINGSTON: Your Honor, I would point
22 out --

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1 JUDGE NELSON: -- what remains to be done.

2 MR. LIVINGSTON: -- they've had since
3 February 26th to respond, and others did respond. KCS
4 is the only one in here seeking, in a sense, a Phase
5 1-1/2.

6 JUDGE NELSON: And they also knew from the
7 last ruling that these were being treated as Phase
8 1 --

9 MR. LIVINGSTON: Absolutely. And we got
10 nothing from them in Phase 1. Zero.

11 I would also request, Your Honor, that it
12 be a --

13 JUDGE NELSON: I gave Mr. Lubel that -- in
14 breaking the case into phases, I tried to be as far as
15 I could with a view to the burdens the intervenors
16 were facing in preparing their cases under the
17 Commission-imposed deadline.

18 MR. LUBEL: Your Honor?

19 JUDGE NELSON: I think that was a fair
20 line to draw, and I'm pleased with having drawn it.
21 And at the same time, for you now to be struggling
22 with the Phase 1 materials is a little bit gilding the

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1 lily. And I've given you now some leniency in regard
2 to this production, and I really think I've heard
3 enough about it.

4 MR. LUBEL: Okay. And this --

5 JUDGE NELSON: Move to the next --

6 MR. LUBEL: I just wanted to understand
7 your ruling. Your ruling applies to the
8 interrogatories and requests that you ruled were
9 Phase 1 materials, and --

10 JUDGE NELSON: 26 or four or five or --

11 MR. LUBEL: Well, my problem with that is
12 some -- I don't believe that all of those --

13 JUDGE NELSON: All right. Let's back up
14 a moment.

15 MR. LUBEL: It's only --

16 JUDGE NELSON: There is a group of unknown
17 interrogatories --

18 MR. LUBEL: And I have them right here.

19 JUDGE NELSON: -- propounded by the
20 applicant to the KCS --

21 MR. LUBEL: Right.

22 JUDGE NELSON: -- as to which you have

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1 said, "We will respond." The only question is when.
2 And with respect to that universe of interrogatories,
3 I don't care if it's five or 85, you're going to
4 answer the interrogatories by close of business
5 tomorrow, to the extent that you can do so.

6 MR. LUBEL: Sure.

7 JUDGE NELSON: Insofar as you've got to
8 search for documents or create documents, or can't
9 answer an interrogatory, you're going to do that on
10 April 3rd. Now, why is that so difficult to
11 understand?

12 MR. LUBEL: Because I thought the basis of
13 your ruling was that the -- some of these
14 interrogatories and requests you had earlier said were
15 to be treated as Phase 1. I just wanted to make sure
16 that you're sticking with that ruling, that our
17 requirement of responding to the interrogatories, and
18 certainly to the requests by April 3rd, and having the
19 documents, are as to what you identified in that
20 hearing, the prior hearing, as the Phase 1 material.

21 JUDGE NELSON: Well, if there's confusion
22 and ambiguity, the only alternative is to go through

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1 interrogatory by interrogatory.

2 MR. LUBEL: I think they did it in their
3 letter.

4 JUDGE NELSON: They're not willing to --

5 MR. LIVINGSTON: We listed the 26 -- he
6 said there are 26. I haven't counted; I'll assume
7 that by -- he didn't specifically --

8 JUDGE NELSON: Did you --

9 MR. LIVINGSTON: -- he didn't --

10 JUDGE NELSON: -- about them?

11 MR. LIVINGSTON: I don't think so.

12 JUDGE NELSON: Are they all in the same
13 category?

14 MR. LUBEL: No. That's why I'm confused
15 now.

16 JUDGE NELSON: I thought the company was
17 saying that the problems we had with regard to
18 interrogatory 5 were typical of the entire group of --

19 MR. LIVINGSTON: Of the -- and that is
20 absolutely right.

21 JUDGE NELSON: Now Mr. Lubel says that is
22 incorrect.

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1 MR. LIVINGSTON: No, I don't think he is
2 saying that it's incorrect. I think he's trying to
3 suggest that some of these were not Phase 1.

4 MR. LUBEL: That's right.

5 MR. LIVINGSTON: This is not --

6 JUDGE NELSON: All right. What's the
7 first interrogatory?

8 MR. NORTON: Well, Your Honor --

9 JUDGE NELSON: I'm sorry. The gentlemen
10 will have to proceed in the old-fashioned way. What
11 is the first interrogatory at issue now, number 5?

12 MR. NORTON: Your Honor, if I might just
13 -- I think it would help explain something. What
14 Mr. Lubel I think was alluding to was the fact that
15 some of the KCS requests were not covered by precise
16 questions in the Conrail requests, so that the rulings
17 as to Phase 1 or Phase 2 did not necessarily apply to
18 all of these requests, although it applied to many of
19 them. And I think he may have been trying to say
20 that --

21 JUDGE NELSON: I don't know any way to
22 sort it out other than interrogatory by interrogatory.

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1 Let's direct our attention to applicant's
2 interrogatory number 5.

3 MR. LIVINGSTON: All right.

4 JUDGE NELSON: The one above Mr. Grimm's
5 stuff.

6 MR. LIVINGSTON: That's a very --

7 JUDGE NELSON: Now, with respect to
8 interrogatory number 5, is that the one where you are
9 willing to respond, but want to respond later rather
10 than now, Mr. Lubel?

11 MR. LUBEL: Yes, Your Honor, that was --
12 and I didn't understand that to be --

13 JUDGE NELSON: All right. With regard
14 to --

15 MR. LUBEL: -- in Phase 1.

16 JUDGE NELSON: With regard to
17 interrogatory number 5, whatever label you want to put
18 on it, I'm directing that you answer the
19 interrogatories by close of business tomorrow, to the
20 extent that they can be answered.

21 MR. LUBEL: Certainly.

22 JUDGE NELSON: As to all other aspects,

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1 such as creating, searching, and producing documents,
2 you will do that on April 3rd.

3 Now, I understand that there's a document
4 request that parallels this. That is what, document
5 request 36?

6 MR. LUBEL: No, I believe it was 42, Your
7 Honor.

8 JUDGE NELSON: Well, can we agree that
9 these rulings as to the interrogatories shall be --

10 MR. LUBEL: Oh, should apply --

11 JUDGE NELSON: -- the same a fortiori as
12 to document production?

13 MR. LUBEL: Certainly, Your Honor.

14 JUDGE NELSON: Next, is number 6.

15 MR. LUBEL: Again, we did not understand
16 that to be a Phase 1 category.

17 MR. LIVINGSTON: Well, there's no direct
18 counterpart on the Conrail side. But this was the
19 kind of specific narrow interrogatory that was being
20 given Phase 1 treatment, as I understood it.

21 JUDGE NELSON: This looks to be much like
22 interrogatory 5.

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1 MR. LUBEL: It is, Your Honor.

2 JUDGE NELSON: All right. Let me -- I'm
3 going to make the same ruling.

4 MR. LUBEL: I'll shortcut things here, so
5 we don't have to go through this long and painful
6 process. We'll just accept your ruling. And although
7 I didn't understand all of these other interrogatories
8 were considered Phase 1, we'll treat them as such
9 based on your ruling, so we don't have to go through
10 them all.

11 JUDGE NELSON: Let's say whatever the
12 history may have been, right, the ruling now --

13 MR. LUBEL: We understand.

14 JUDGE NELSON: -- upon further review of
15 the matter, is that I'm breaking it into these two
16 pieces.

17 MR. LUBEL: Okay. That's fine, Your
18 Honor.

19 JUDGE NELSON: And you're going to respond
20 to the first piece by close of business tomorrow, to
21 the extent you can do so. And the more of those
22 responses there are the more credibility you take on.

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1 MR. LIVINGSTON: Your Honor, that leaves
2 just two last and separate bullets on the KCS letter,
3 and they are the second and third bullets on the
4 second page.

5 JUDGE NELSON: Yes. That was 25, 50, and
6 51.

7 MR. LIVINGSTON: Right. Now, as to
8 number 25, you've already directed us to consult on
9 interrogatory 33, I think it is. I think we should
10 also consult on 25 and not talk about it right now.

11 JUDGE NELSON: All right.

12 MR. LIVINGSTON: We will make a --

13 JUDGE NELSON: Does that make sense,
14 Mr. Lubel?

15 MR. LIVINGSTON: We will make a narrowing
16 proposal.

17 MR. LUBEL: Grain shippers and plastic
18 shippers? I'd like him to try to explain how that's
19 relevant from us.

20 MR. LIVINGSTON: Well, I'm prepared to
21 make him a narrowing proposal during the break on
22 number 25.

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1 JUDGE NELSON: Well, that's always
2 helpful.

3 MR. LUBEL: I'll listen to it.

4 JUDGE NELSON: So we'll see what comes out
5 of that.

6 MR. LIVINGSTON: That --

7 JUDGE NELSON: So 50 and 51 are next.

8 MR. LIVINGSTON: Right. And they are sort
9 of a pair. They're on pages 29 and 30, and they're
10 very similar. This has -- and 50 -- of the two, 50 is
11 the more important.

12 JUDGE NELSON: 50.

13 MR. LIVINGSTON: 50 is the more important
14 one.

15 JUDGE NELSON: This assumes that KCS
16 obtained some trackage rights or haulage rights for
17 the BN and Santa Fe. Did they?

18 MR. LIVINGSTON: Yes.

19 MR. LUBEL: We did, Your Honor.

20 MR. LIVINGSTON: We are -- it seems to us
21 it's fairly obviously relevant, for reasons that have
22 been discussed in the context of other railroads.

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1 JUDGE NELSON: Oh, I certainly would think
2 so. Maybe we can tailor it a little, but --

3 MR. LIVINGSTON: We would be willing --

4 JUDGE NELSON: -- because I think I've had
5 trackage rights agreements work.

6 MR. LIVINGSTON: Right. We would be
7 willing to --

8 JUDGE NELSON: That's important in this
9 case.

10 MR. LIVINGSTON: Right. Limit this to --

11 JUDGE NELSON: No one has argued that more
12 vigorously and persuasively sometimes than Mr. Lubel.
13 So we've got to have that. What's haulage rights? I
14 haven't heard that term.

15 MR. LUBEL: Well, that's, I think, a --

16 JUDGE NELSON: A first cousin of --

17 MR. LUBEL: Well, yeah, or a stepchild.
18 It's -- I think you have somebody else carry your
19 traffic for you.

20 MR. LIVINGSTON: Right.

21 JUDGE NELSON: Is that envisioned by the
22 BN Santa Fe agreement in the present merger case?

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1 Haulage rights?

2 MR. LIVINGSTON: I'm not certain. It may
3 be in one of the -- an agreement that provides an
4 either/or situation.

5 MR. LUBEL: Yeah, it's there as an option
6 for that, but -- of course, our position would be,
7 Your Honor, this is talking about a KCS agreement.
8 We've already committed to make available --

9 JUDGE NELSON: I understand. I'm going to
10 order production as to request number 50. I'm willing
11 to entertain any suggestion as to particular trackage
12 rights or haulage rights that might be the focus of
13 discovery, so as to ease the burden.

14 MR. LUBEL: I think it's a limited area.

15 MR. LIVINGSTON: It's a very limited area.

16 JUDGE NELSON: It is. There just aren't
17 that many to begin with.

18 MR. LUBEL: Well, it's just what we got
19 under that agreement.

20 MR. LIVINGSTON: It's just what they got
21 from that merger.

22 JUDGE NELSON: And if there's attorney-

1 client, of course you may withhold that. Work-
2 product, joint defense, you may want to --

3 MR. LIVINGSTON: And then the last --

4 JUDGE NELSON: -- bring in an in camera,
5 or something of that nature, so I see what it is.
6 It's hard for me to understand.

7 MR. LUBEL: Well, Your Honor, if I
8 might --

9 JUDGE NELSON: How it's dealing with
10 tracking rights --

11 MR. LIVINGSTON: Well, because they're
12 asking for internal -- what if our General Counsel
13 talked to our outside lawyers about that.

14 MR. LUBEL: our Honor, if I might make --

15 JUDGE NELSON: Can we make it clear that
16 we're excluding lawyers' opinions, thoughts, analyses,
17 views? You don't want legal stuff here. Do you want
18 the --

19 MR. LIVINGSTON: I don't want privileges
20 to --

21 JUDGE NELSON: -- to the working of the
22 trackage rights and the haulage rights?

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1 MR. LIVINGSTON: But I don't want any of
2 the privilege --

3 JUDGE NELSON: You want railroads.

4 MR. LUBEL: And, your Honor, let me -- if
5 I might make the record clear on this, and I mentioned
6 this to counsel during our break, we think this is
7 irrelevant because we don't believe -- one reason is
8 it's my understanding that although there is an
9 agreement granting these rights that it was never
10 utilized. So that there has been no utilization of
11 the trackage rights under that agreement, so there is
12 -- you know, how can there be any relevance to it.

13 JUDGE NELSON: You could show how a
14 railroad goes about planning how to use them. They
15 could do something with that.

16 MR. LIVINGSTON: The merger has only been
17 in effect for a short period.

18 JUDGE NELSON: I'm going to order
19 production as to request number 50, except insofar as
20 it enters into the attorney-client, work-product or
21 joint defense areas.

22 MR. LIVINGSTON: 51.

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1 JUDGE NELSON: 51?

2 MR. LIVINGSTON: If he's right that they
3 haven't done any implementing --

4 JUDGE NELSON: Then there are no
5 complaints.

6 MR. LIVINGSTON: -- then there shouldn't
7 be any complaints.

8 JUDGE NELSON: So the answer should be
9 simply to that one.

10 Okay. Anything else?

11 MR. LIVINGSTON: The last bullet is
12 actually sort of related to the prior ones. It's the
13 question of the traffic tapes. They have offered to
14 give us -- this is document request number 28. What
15 we would like, Your Honor, is to get the traffic tapes
16 that they have now, because we -- so that we can start
17 working with them.

18 It's my understanding, and I'm not a
19 computer expert, that it's quite a simple matter to
20 pull a disk out and turn it over. And it would make
21 a lot of difference if we could get their traffic disk
22 now as opposed to later.

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1 JUDGE NELSON: So this is a dispute about
2 when it happens.

3 MR. LIVINGSTON: Essentially, that's true.

4 MR. LUBEL: It is, Your Honor. It's --
5 also, it is a dispute, to some extent, as to scope,
6 because we are willing to and plan to produce the
7 traffic tapes that we use -- the traffic tapes that
8 we've used in our analysis, and we are making those
9 available. I've given that request to our consultant.

10 His problem right now, Your Honor, is that
11 he is doing analysis right now to put into our
12 submittal, and he has to stop doing that and go -- to
13 go and try to prepare traffic tapes to produce to
14 them. We are going to give it to them. It's just a
15 question of do we have to stop doing our submittal to
16 put those together?

17 It's not just a simple matter --

18 JUDGE NELSON: There's only one person
19 that can find chem?

20 MR. LUBEL: That's correct, Your Honor.
21 At the consultant that has these, there is -- I mean,
22 they may have one or two people there, but they are

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1 all busy on our effort to do the analysis for the
2 Board of this merger. And this is something that
3 would have to divert them from it.

4 JUDGE NELSON: Why isn't it a simple
5 matter of getting a disk?

6 MR. LUBEL: Because, Your Honor, you have
7 to make sure that the proper information is on there,
8 and, you know, I guess -- I don't know about proper
9 formatting, but I know you have to make sure that the
10 proper information is on there to make it available to
11 you.

12 JUDGE NELSON: How long is it going to
13 take you to get this information?

14 MR. LUBEL: I asked them that. They said
15 that they would try to get it around the time that we
16 made our filing, that they -- you know, hopefully,
17 they'll have -- you know, if we finish our filing and
18 get it to the printer by the 27th, then they would be
19 free on the 28th to try to prepare that. I mean, I
20 will commit that they will start doing it --

21 JUDGE NELSON: I'm not sure I understand
22 why only one person can do it. This sounds like a

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1 fairly menial thing. I don't know about --

2 MR. LUBEL: It's not. In the first place,
3 it is not at -- my understanding is it is not at KCS,
4 that it is with our -- it is our consultant that has
5 to -- to assemble this information.

6 JUDGE NELSON: The computerized KCS data
7 is not at KCS?

8 MR. LUBEL: That's right. The traffic
9 tapes they're asking for are handled by the
10 consultant. We've heard testimony about that from
11 them, that they have computer consultants.

12 JUDGE NELSON: Where do the tapes come
13 from?

14 MR. LUBEL: The information, I'm sure,
15 comes from KCS operations. It then has to be provided
16 to the consultant, put on the computer, properly
17 formatted --

18 JUDGE NELSON: Why don't we have the
19 applicant send a computer expert to your person's
20 office and do the work?

21 MR. LUBEL: Your Honor, I don't think that
22 would be -- I don't think that would be acceptable.

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1 JUDGE NELSON: Why?

2 MR. LUBEL: I think there are matters of
3 confidentiality involved here. We don't want their
4 people in our shop. They wouldn't want our people in
5 their shop.

6 JUDGE NELSON: Well, I'm not happy with
7 this answer.

8 MR. LUBEL: Your Honor, we --

9 JUDGE NELSON: I think that we are all a
10 prisoner of what other people tell us about this, and
11 I'm not sure that we're getting to the bottom of it.
12 I'm not getting a feeling for why this isn't a simple
13 mechanical --

14 MR. LUBEL: I must say, Your Honor, we --
15 here is the point, Your Honor. Let me just say this
16 again. You might have a tape that's there right now.
17 Okay? Granted. But it may have a lot of information
18 on there that they are not entitled to. It may have
19 information on there that KCS has not used for its
20 analysis in this case.

21 JUDGE NELSON: I see.

22 MR. LUBEL: Which is all they're entitled

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1 to. So we can't just dump our tape which gives them
2 all of our proprietary information and things that
3 they're not entitled to in this case. He has to go
4 through it and say, "Okay. What is properly on the
5 traffic tape that they're entitled to, that KCS itself
6 uses and relies on, and will use and rely on in its
7 analysis here?" That's what takes the time.

8 I also might add, getting back to this
9 question of parity, Your Honor, we asked --

10 JUDGE NELSON: Well, if we didn't have
11 this Commission schedule here, or Board schedule, I
12 could say, "What do you need this tape for now,
13 anyway?" to the other side. Leave them alone. Let
14 them file their papers, and then get the tape.

15 MR. LUBEL: And it's a matter of days,
16 Your Honor. They're going to get this. That's our
17 top priority is to get them our traffic tapes.

18 JUDGE NELSON: What do you want to do with
19 this tape in the meantime?

20 MR. LIVINGSTON: Well, because it's a
21 tape, our people, when they get it, will have to mount
22 it, look at it, and understand how it works. And that

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1 will take time, and, therefore, the sooner we get it
2 the better.

3 But it will show information about their
4 traffic and about where it comes from, where it goes,
5 and it directly relates to claims they may be making
6 concerning the impact of the merger on their traffic
7 flows, or the impact of the BN settlement deal on
8 their traffic flows, or the impact of whatever
9 proposals they're going to make on their own traffic
10 flows.

11 This is essential data to corroborate --

12 JUDGE NELSON: Who is the person that
13 knows about this?

14 MR. LUBEL: Mr. Joe Plaistow is the person
15 who can --

16 JUDGE NELSON: And where is he located?

17 MR. LUBEL: -- the consultant that I deal
18 with on this, and I've talked to him about this.

19 JUDGE NELSON: Where is he located?

20 MR. LUBEL: He's here in the D.C. area.

21 JUDGE NELSON: Could you get him over
22 here?

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1 MR. LUBEL: I don't think I could get him
2 over here today, Your Honor. I mean, he is busy
3 putting together our case.

4 JUDGE NELSON: Could he be here tomorrow
5 morning?

6 MR. LUBEL: Your Honor, he could, but then
7 they win. They take our people away from preparing
8 the case and make them deal with their discovery which
9 they don't even need now.

10 And you know what they're going to say to
11 me, Your Honor? They're going to say two things, and
12 I've seen his timesheets. I've seen that he works --
13 Mr. Plaistow works seven days a week, sometimes 12 and
14 15 hours a day. He has been doing that, and he is
15 going to continue doing that.

16 JUDGE NELSON: What if we go over there?
17 Where is his office?

18 MR. LUBEL: You know what he is going to
19 say, Your Honor? You know what he is going to say?

20 JUDGE NELSON: We'll save him the cab
21 fare.

22 MR. LUBEL: He's going to say, "Wait a

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1 minute. It took them months to give us the tapes the
2 way we wanted. How can they expect to come in here in
3 a matter of weeks, make" --

4 JUDGE NELSON: I'll tell him it's too late
5 to do all of that, and we want to know about what the
6 problems are right now.

7 MR. LIVINGSTON: We produced traffic tapes
8 prior to the filing of the application.

9 MR. LUBEL: It took them over a month --
10 or approximately a month to produce them after I asked
11 for them. And then, when they got them, they weren't
12 in the condition that we needed, and it took us a
13 matter of months to keep going back and saying, "No,
14 you didn't get it right."

15 JUDGE NELSON: I have from 8:00 to 10:00
16 a.m. tomorrow morning. Want to have Mr. -- what is
17 his name? Do you want him over here?

18 MR. LIVINGSTON: No, I want the disk or
19 the tape or the --

20 MR. LUBEL: Your Honor, I think --

21 MR. LIVINGSTON: -- or whatever the --

22 MR. LUBEL: -- I think his time would be

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1 better spent --

2 JUDGE NELSON: The actual predicate here
3 to the claim that they can't do it.

4 MR. LIVINGSTON: Well, perhaps we could
5 have a --

6 MR. LUBEL: Your Honor, his time would be
7 better spent doing the work that he's got to do --

8 JUDGE NELSON: I'm suggesting we get him
9 on the stand, and we'll find out what the story is.

10 MR. LIVINGSTON: We can do that, or we can
11 do it on a conference call tomorrow.

12 MR. LUBEL: Your Honor, with all due
13 respect, his time would be better spent doing what he
14 does, which is the computer stuff that he does, both
15 putting together our case and trying to do the work to
16 get them the traffic tapes.

17 JUDGE NELSON: Does he work with anybody?

18 MR. LUBEL: I'm sure he has, you know,
19 assistants that he works with, Your Honor. But he is
20 the --

21 JUDGE NELSON: Is he an employee, or is he
22 retained as a consultant?

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1 MR. LUBEL: No, he is not an employee of
2 the company. He is an employee of the consultant.

3 JUDGE NELSON: What is the name of the
4 consultant?

5 MR. LUBEL: It's Snavelly, King and
6 Associates.

7 MR. LIVINGSTON: Oh, that's a very
8 substantial railroad firm. They've got lots of people
9 over there.

10 MR. LUBEL: Well, lots of people, sure.
11 But they might be working on other things. That
12 doesn't answer anything, Your Honor. We are getting
13 them the tapes. It is a high priority for us. But
14 the first -- here is the basic question, Your Honor.
15 Which has the higher priority, our making our
16 submittal which is basically -- has to be done in one
17 week --

18 JUDGE NELSON: If I were doing this, and
19 I weren't the Surface Transportation Board, I'd say,
20 of course, you take the time, get your filings in, and
21 then we'll deal with the other side's discovery, at
22 the time it has to do something. It doesn't have to

1 do anything now except read your stuff.

2 MR. LUBEL: This information is available
3 -- some of this information is available in the ICC
4 weighbill samples.

5 JUDGE NELSON: But the way the Board left
6 this, if it's susceptible of a construction then we
7 have to do some of that discovery now. That's why I
8 was trying to divide the problem. Is there part of
9 this taping that we could do now?

10 MR. LUBEL: That's a technical question I
11 will ask, but I do not know, Your Honor.

12 JUDGE NELSON: Is it like one box of
13 stuff?

14 MR. LUBEL: Well, they produced to us --

15 JUDGE NELSON: One tape? Roll of tape?
16 What does it look like?

17 MR. LUBEL: I don't know if they know.
18 Ms. Kramer dealt with it and --

19 JUDGE NELSON: Ms. Kramer, are you
20 familiar with this?

21 MR. LIVINGSTON: Not with theirs.

22 MS. KRAMER: Your Honor --

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1 JUDGE NELSON: What they may have --

2 MR. LUBEL: They are mainframe tapes, Your
3 Honor.

4 JUDGE NELSON: Ms. Kramer is a younger
5 person, which confirms my belief that this is
6 generational.

7 (Laughter.)

8 So I'd like to hear from you on this
9 issue.

10 MS. KRAMER: Your Honor, at least the
11 tapes that I have seen are -- they are apparently
12 mainframe tapes. I'm not at all familiar with what
13 the data is in them, but they are black cartridges
14 that look like -- they are about this big and they
15 are --

16 JUDGE NELSON: Like a videocassette?
17 Would they look like --

18 MS. KRAMER: No, they are sort of
19 roundish.

20 JUDGE NELSON: Yes.

21 MS. KRAMER: And they apparently, what
22 I've been told, is that they are mainframe tapes.

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1 MR. LIVINGSTON: That's what --

2 MS. KRAMER: At least the ones that we've
3 produced.

4 JUDGE NELSON: What does that mean, when
5 you say mainframe?

6 MR. LUBEL: It means -- well, go ahead.

7 MS. KRAMER: That you need some sort of
8 mainframe machine in order to copy them or to do
9 various --

10 MR. LUBEL: Your Honor?

11 MS. KRAMER: They're not -- you can't take
12 one of these cartridges and put it into a PC and have
13 it do anything.

14 MR. LUBEL: At the risk of getting into
15 somebody else's --

16 JUDGE NELSON: If we took this package
17 upstairs to my office, could we do anything with it?

18 MS. KRAMER: No.

19 MR. LUBEL: No.

20 JUDGE NELSON: We wouldn't hear any music?

21 MS. KRAMER: No.

22 JUDGE NELSON: We need some more

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1 sophisticated equipment.

2 MS. KRAMER: Yes.

3 JUDGE NELSON: Okay.

4 MR. LIVINGSTON: That's our tapes.

5 JUDGE NELSON: Does the Kansas City
6 Southern have that equipment?

7 MR. LIVINGSTON: Well, they've had our
8 tapes, and they've --

9 JUDGE NELSON: They must have the
10 equipment, since they translated your stuff.

11 MR. LIVINGSTON: Right. We -- I don't
12 know what their tapes look like, whether they're on a
13 cartridge or in a --

14 JUDGE NELSON: Ms. Kramer, is it like one
15 cartridge, or is there a series of them?

16 MS. KRAMER: Your Honor, the only thing I
17 can speak about the tapes that I am familiar with that
18 we've produced for --

19 JUDGE NELSON: That's fine.

20 MS. KRAMER: -- UP and SP. And they are
21 cartridges, but sometimes they are more than one
22 cartridge, which indicates --

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1 MR. LIVINGSTON: Your Honor, I don't see
2 how we can say that since we don't keep their tapes.

3 JUDGE NELSON: It's a hard question for
4 Ms. Kramer because she's working for a man who wants
5 to say I want everything now. And so I don't want to
6 create --

7 MR. LIVINGSTON: Well, I want to make --
8 we don't know whether they keep their stuff in
9 cartridges or disks or tapes or in shoe boxes. And we
10 really can't answer the technical question of what can
11 they push a button and produce tomorrow.

12 JUDGE NELSON: Well, suppose we have Mr.
13 So and So over here tomorrow morning; and if we need
14 to, we'll put him on the stand. Then we can get a
15 threshold for all this.

16 MR. LUBEL: Your Honor, I beg you not to
17 grant the applicants what they've been trying to do.
18 They've been trying to scuttle our preparation. If
19 you drag Mr. Plaistow over here, it's basically
20 saying, you know, let them do just what they wanted to
21 do, clip us, take us out of the action for a while.

22 JUDGE NELSON: Are you saying that Mr. --

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1 what's his name?

2 MR. LUBEL: Plaistow.

3 JUDGE NELSON: Mr. Plaistow comes over
4 here and talks to us for an hour or so, perhaps the
5 functional equivalent of a turn over of the whole
6 thing anyway?

7 MR. LUBEL: No, not necessarily.

8 JUDGE NELSON: Because if so, I was going
9 to then direct you to turn the whole thing over.

10 MR. LUBEL: Not necessarily, but you would
11 still have the problem that I mentioned before. That
12 my understanding is that it has lots of data on it,
13 more --

14 JUDGE NELSON: Excuse me, this is
15 important enough for the applicants to see and
16 important enough for you to resist. It ought to be
17 worth an hour of Mr. Plaistow's time so he can explain
18 it to us. And if you make me understand it, I'll be
19 persuaded and grant you the relief you're seeking.

20 MR. LUBEL: Can we do it by telephone,
21 Your Honor?

22 MR. DOWD: Your Honor, I have some

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1 experience with both Union Pacific traffic tapes and
2 Kansas City traffic tapes, and I also know Mr.
3 Plaistow reasonably well. And if you'd like, I can --

4 JUDGE NELSON: And you're an experience
5 railroad lawyer so you know what we're talking about.

6 MR. DOWD: I can make a stab at explaining
7 it for you a little bit.

8 JUDGE NELSON: Go ahead.

9 MR. DOWD: Traffic tapes for the major
10 carriers essentially record raw data on all of their
11 movements. They are mainframe computer tapes. They
12 cannot be manipulated in that form. What you do is
13 you take the mainframe tape, if you have a mainframe,
14 you use your own, most likely.

15 What you do is you go to, you know, IBM
16 rent-a-mainframe or something, and you put it up on a
17 mainframe, and then you extract --

18 JUDGE NELSON: What is it, one big reel,
19 or is it little --

20 MR. DOWD: It depends upon how many years
21 worth of data you're talking about. You know, you
22 might have two or three reels. You might have ten,

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1 depending upon the --

2 JUDGE NELSON: How many are being sought
3 in these interrogatories? One year, right?

4 MR. LUBEL: It's the traffic data for '94.

5 JUDGE NELSON: One year.

6 MR. LUBEL: Your Honor, the point I was
7 making before is that if he's diverted from his work
8 to have to come do this, then, you know, they win in
9 terms of diverting us. I would ask that if you do
10 want to talk to --

11 JUDGE NELSON: If he's heard for one hour
12 --

13 MR. LUBEL: Can we do it be telephone?

14 JUDGE NELSON: Maybe not. Maybe I don't
15 understand it and I need to see the stuff.

16 MR. LUBEL: I don't think that there's
17 anything --

18 JUDGE NELSON: I can't even operate a
19 video thing that you put in the -- one of those boxes
20 --

21 MR. DOWD: Your Honor, there probably
22 isn't anything you can see.

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1 MR. LUBEL: Yeah, Your Honor, I don't
2 think it's anything that can be seen that relates to
3 it. I mean, Mr. Plaistow will be happy to explain it
4 if we have to do that.

5 JUDGE NELSON: Do you want him here?

6 MR. LIVINGSTON: Well, I'd be willing to
7 start with a phone call, and maybe that would be
8 sufficient. I think we need an explanation of why he
9 can't turn these disks -- give us a tape or a disk or
10 a cartridge.

11 MR. LUBEL: Your Honor, there is a
12 substantive point here that I think you need --

13 JUDGE NELSON: I would want a reporter
14 here so we have a formal telephone --

15 MR. LUBEL: Your Honor, here's a
16 substantive point here. Our position is they are
17 entitled to the traffic tapes that we are using in our
18 **submittal** and in our analysis. And that is what he
19 **needs** to put together. And they don't have the right
20 to any tapes we have that have data on them.

21 JUDGE NELSON: There's only one copy in
22 the world?

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